IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04-08-2006

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

W.P.No.15294 of 2004
and W.P.M.P.No.18163 of 2004

M/s.Priya Lotteries
represented by its Partner
Mr.S.V.Shankar
No.17/3 Manimegalai Street
17th Ward, East Tambaram
chennai - 59. ... Petitioner

Versus

The Deputy Commercial Tax Officer
Royapettah II Assessment Circle
Greenways Road
Chennai - 28. ... Respondent

For Petitioner :: Mr.P.Rajkumar
For Respondent :: Mr.M.Udayakumar,Govt. Advocate

Prayer: Writ Petition filed under Article 226 of The Constitution of India for the relief of issuance of a writ of certiorari to call for the records of the respondent in Rc.710/2001/B1 Assessment year 1998-99 and quash the impugned proceedings dated 31.12.2003 on the ground that the same is basically illegal as the same has been passed violating the principles of natural justice and also without adhering to the procedures contemplated under Section 12 of the Tamil Nadu General Sales Tax Act.

ORDER

The petitioner has challenged the assessment order dated 31.12.2003 in this writ petition on the ground that the order so made is ex facie illegal as the same has been passed violating the principles of natural justice and also without adhering to the procedures contemplated under Section 12 of the Tamil Nadu General Sales Tax Act.

2. The facts of the case are : The impugned proceedings was passed based on an inspection conducted by the Enforcement Wing Officials at No.103, Avvai Shanmugam Salai, Chennai - 14, about which the petitioner was not aware of. In the above address, the petitioner had its administrative office till 31.3.1998 and it closed its business activities from 1.4.1998. The petitioner never

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registered itself under the provisions of the Tamil Nadu General Saes Tax Act, as it had the sale office only at Bangalore and was a registered dealer there at Bangalore. For the notice issued to the petitioner with the proposal to levy huge tax and penalty, the petitioner filed his objections on 21.12.2003 stating that the inspection was conducted by the enforcement wing officials at No.103, Avvai Shanmugam Salai, Chennai - 14 with which the petitioner has nothing to do at the time of inspection. The petitioner already vacated the said premises and requested the respondent to make enquiries with one Mr.Rajasekar, proprietor of the Sun Lotteries, who occupied the premises after the petitioner vacated the same. But the respondent without making proper enquiry passed the impugned assessment order as if the petitioner was doing business in the above said premises during the assessment year 1998-99.

3. On 2.6.2004 the writ petition was admitted by this Court and on 27.7.2004, interim order was passed to the following effect:

> "As seen from the assessment orders, the assessee/the petitioner herein has not been given a reasonable opportunity and the proposal has been confirmed on the basis of the floppy recovered from the third party. Hence, there will be an order of stay of all further proceedings pursuant to the assessment order dated 31.12.2003 pending disposal of the above writ petition."

4. While that being so, a Constitution Bench of the Supreme Court in the case of SUNRISE ASSOCIATES VS. GOVERNMENT OF NCT OF DELHI AND OTHERS reported in (2006) 145 STC 576 = JT 2006(5) SC 168 over-ruled prospectively, the earlier judgment of H.ANRAJ VS. GOVERNMENT OF TAMIL NADU reported in (1986) 61STC 165 which held that the lottery tickets were goods and liable to be taxed by holding that two distinct rights were transferred to the purchaser of lottery ticket, i.e., right to participate in the draw and chance to win. It was held that tax could be levied on the right to participate in the draw which was held to be the goods but not on the chance to win which was held to be actionable claim.

5. The decision of the Supreme Court being declaration of the true and correct position of law became applicable to all the transactions and proceedings which have not become final and concluded. The rendering of a judgment by the Supreme Court is not the same as enactment of a statute. A decision of the Supreme Court does not make the law, but merely explains and puts in proper perspective the true position and effect of the law. The true position of law so declared exists from the very date of making the law and not from the date of declaration by the Supreme Court. When a legislature enacts a statute, it creates rights and obligations and therefore its operation can be prospective or retrospective depending upon the provisions of the statute. But when the Supreme

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Court gives a decision declaring the law, it does not create rights and obligations, but merely identifies and declares the pre-existing rights or obligations and declares true or correct position of law. Thus, it is the cardinal principle of construction for every statute is presumed to be prospective unless it is expressly or by necessary implication made retrospective in operation and every decision of the Supreme Court declaring the law as retrospective unless it is expressly by necessary implication restricted to prospective operation.

6. In the case of Sunrise Associates vs. Government of NCT of Delhi, (2006) 145 STC 576, while declaring the law, the Supreme Court has observed that the operation of the law declared in that case would be prospective.

7. What would be principle of prospective over ruling, is candidly explained by the Constitution Bench of the Supreme Court in the case of Somaiya Organics (India) Limited v. State of Uttar Pradesh (2001) 123 STC 623. In the said case in paragraph 41, the Supreme Court observed as follows :

> ".....It is declared that the vend fee realised by the States is not to be refunded to the appellants and, at the same time, the State cannot collect any vend fee for the period prior to October 25, 1989 or thereafter notwithstanding that notices of demand may have been issued or recovery proceedings initiated..."

The judgment further explains the position as follows :

> "..... by prospective over ruling, the Court does not grant the relief claimed even after holding in claimant's favour. In this case, the Court held that the statutory provision imposing vend fee was invalid. Strictly speaking, this would have entitled the appellant to a refund from the respondent of all the amounts collected by way of vend fee. But because, as stated in the *Synthetics* decision (1990) 1 SCC 109 itself, over a period of time imposts and levies had been imposed by virtue of the earlier decision and that the States as well as the petitioners and manufacturers had adjusted their rights and their positions on that basis, this relief was denied. The Court did not, by denying the relief, authorise or validate what had been declared to be illegal or void, nor did it infuse the legislature with the competence upto the date of the judgment."

8. From the above exposition of law it is clear that neither the Government is liable to refund the tax already collected nor entitled to collect any further tax for the period prior to the date of judgment. As far as the present case is concerned, though the assessment order has been passed, which is the subject matter of the writ petition on the basis that the lottery tickets are goods and

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the sale of which are liable to be taxed, no amount has been collected from the petitioner towards tax and the same is pending consideration before this Court. At the time of admission, the Court has also granted stay of collection of tax.

9. In the light of the decision of the Supreme Court in the case of *Sunrise* referred to supra and also the decision of the Supreme Court in the case of Somaiya Organis India Private Limited explaining the principle of prospective over ruling, I am of the considered view that the writ petition has to be allowed by setting aside the order of assessment, which is impugned in this writ petition and the State is not entitled to collect any tax on the sale of lottery tickets. The writ petition is accordingly allowed. No costs. The connected miscellaneous petition is closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

The Deputy Commercial Tax Officer
Royapettah II Assessment Circle
Greenways Road
Chennai - 28.

+1cc to Mr.P.Rajkumar, Advocate Sr 34870
+1cc to The Spl. Govt. Pleader (Taxes) Chennai 104 Sr 34942

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